MOTION FILED
DEC 14 1982

No. 82-805

In The
Supreme Court of the United States
OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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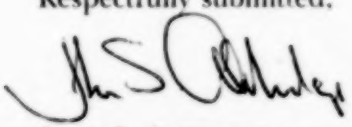
MOTION TO FILE BRIEF OF AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI

The Texas Association of School Boards respectfully moves this Court for leave to participate as *amicus curiae* herein, for the purpose of filing the attached brief in support of the Appellants' Petition for Certiorari.

Respectfully submitted,



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MEMORANDUM OF TEXAS ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI

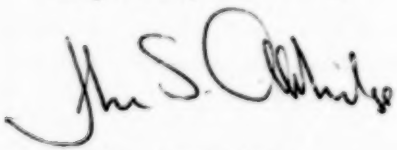
TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Texas Association of School Boards has moved this court for leave to file the attached brief in the capacity of *amicus curiae* in support of the petition for writ of certiorari.

The Association, a nonprofit organization made up of over 1,100 Texas school districts, is concerned with the impact of the case at bar on local day-to-day school operations.

The decision of the court below, rather than provide guidance to school districts, makes it difficult for districts to comply with the requirements of the U.S. Constitution. Statewide, districts have been confused rather than enlightened with the opinion of the court below. It is imperative that the U.S. Supreme Court offer guidance in the area of neutral policies regarding voluntary student religious organizations. Because this Court could offer guidelines that presently do not exist in this area, and because the decision in the Fifth Circuit Court of Appeals will spawn more litigation than it curtails, the Texas Association of School Boards asks this court to grant leave to present the views of its members, who favor the granting of the writ of certiorari.

Respectfully submitted,



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QUESTION PRESENTED

Whether the establishment clause of the first amendment to the U.S. Constitution prohibits voluntary student religious clubs from using public school facilities for meetings outside regular school hours on the same basis as other voluntary student groups.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Lubbock Independent School District, its board of trustees, and its superintendent have petitioned for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals reported at 669 F.2d 1038. To seek clarification of the law affecting the school districts it represents, the Texas Association of School Boards, by and through its attorney of record, John S. Aldridge, hereby registers its support for grant of the petition for a writ of certiorari in order to have the judgment of the court below reviewed.

INTEREST OF AMICUS CURIAE

The Texas Association of School boards, a nonprofit organization, has a membership consisting of more than 1,100 school districts in the State of Texas. Its member schools educate over 99% of the student population of elementary and secondary schools in Texas. In an effort to represent and assist local school boards, the Association seeks to express the concerns of its membership, particularly in a case that so significantly affects every school district in the state.

ARGUMENT FOR GRANT OF THE WRIT OF CERTIORARI

The school districts of the State of Texas are anxious to comply with the mandates of the Constitution and the federal courts concerning the treatment of religion in the public schools. Unfortunately, past U.S. Supreme Court decisions in this area have dealt only with statutes and regulations that required prayer or other religious activities during the school day led by school employees. In recent years, lower court decisions, including those of the Fifth Circuit Court of Appeals, have provided some answers, but not to the extent needed by school administrators. Because Texas school districts, including Lubbock ISD, have little guidance in this area, the Association membership would welcome a Supreme Court ruling on the particular practice and policy at issue in this case. The issue is one faced not only by Texas public schools, but by school districts across the United States.

The portion of the policy struck down by the Fifth Circuit in this case states:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups . . . for any educational, moral, religious or ethical purposes so long as attendance at such meeting is voluntary. 669 F.2d at 1041 n.7.

The most recent cases involving prayer established by the schools are fairly clear. For example, the Fifth Circuit ruled that a Louisiana statute permitting voluntary prayer *during* the school day is unconstitutional. In that case, the statute being challenged required teachers to ask for a student volunteer to lead the prayer, and if no one did so, the teacher was required to lead. *Karen B. v. Treen*, 653 F.2d 897

(5th Cir. 1981). Another circuit court ruled that permitting prayers at student assemblies during the school day violated the establishment clause. *Collins v. Chandler*, 644 F.2d 759 (9th Cir. 1981).

Two cases involving more difficult issues, such as student prayer groups, were expected to give some guidance, but failed to answer many school district questions. *Brandon v. Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), and the case at bar involve similar kinds of student groups, who sought to meet on their own in school classrooms immediately before or immediately after school. But there the similarity ends.

In *Brandon*, students, who were not members of an organized group, sued the school district for an injunction. They claimed that they had the right, if they so chose, to meet on school campus immediately before school under the same criteria as other nonreligious groups for the purpose of conducting prayer meetings. The students argued that failure to provide access to the classrooms because of their religious speech would amount to a violation of the free exercise clause.

The Second Circuit concluded that school districts are not *required* to permit students to conduct voluntary prayer meetings under the free exercise clause of the U.S. Constitution. It did not address whether a district *may* so permit. By contrast, the case at bar involves the authority of a school district to provide access to a wide variety of student groups for "educational, moral, religious, or ethical purposes." In the instant case, the court below gave *Brandon* an expansive interpretation, concluding that school districts are actually *prohibited* from treating student religious groups the same as other student groups. While the Fifth Circuit in the decision below cited *Brandon* to support its decision striking down the

Lubbock school district's policy, it did not set out guidelines that school districts can follow. For example, the court cited a statement indicating that a neutral policy could be shown to have a constitutionally permissible purpose, i.e., to encourage students to participate in a wide variety of extracurricular activities. Yet, almost immediately after, the court concluded that the neutral policy of the Lubbock school district violated the establishment clause. The decision of the appellate court is confusing for school districts because on the one hand voluntary meetings are approved and on the other hand are struck down. As the dissent in the denial of Petition for Rehearing stated below: ". . . [I]f it is to be Fifth Circuit law that students of public schools may not meet in school facilities for religious purposes, the court should leave no doubt about it." *Lubbock Civil Liberties Union v. Lubbock Independent School District*, No. 80-2384 (5th Cir. July 16, 1982) (denial of rehearing en banc) (dissenting opinion).

Additionally, the Fifth Circuit opinion places great significance on the fact that the title of the policy was "Religion in the Schools," as opposed to "Student Meetings," for example. Whether that, in itself, is a violation of the establishment clause is an issue that is not clear from the Fifth Circuit decision.

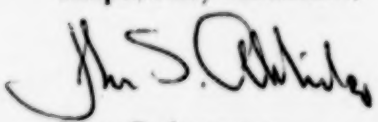
Another item of confusion in the appellate court opinion is the reference to having meetings "at a time closely associated with the school day." In *Brandon* the students were meeting after the buses arrived on school campus, but before classes began. On the other hand, in *Lubbock CLU* the policy permitted students to meet not only before, but also "after regular school hours." How close is "closely associated with the school day"? If the student groups wish to use the school facilities in the late afternoon on the same basis as the local Parent Teacher Association, would the *Lubbock CLU* case require that the trustees deny them access? It is well established

that the first amendment to the U.S. Constitution prohibits a public entity from discriminating against a person or group on the basis of the content of their speech. *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Denying access to a student group would require just such a decision, i.e., one based on the content of the speech.

CONCLUSION

The school districts of the State of Texas are charged with the duty of providing an education for children, setting reasonable rules and regulations in operating schools for their students' benefit, and working within the limits of the law in those efforts. The lack of guidance in the area of voluntary student religious meetings makes impossible the job of determining what is legally permitted and what is prohibited. The decision of the Fifth Circuit has served only to confuse school districts, who, in good faith, are seeking to comply with the requirements of the U.S. Constitution. In order to attain answers to questions that thus far have not been answered, the school districts of the State of Texas, through the Texas Association of School Boards, request that the petition for writ of certiorari be granted.

Respectfully submitted,



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December, 1982

CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Motion, Memorandum, and Brief of Amicus Curiae in support of Appellants' Petition for Writ of Certiorari have been served upon all parties by placing same in the United States Mail, addressed to:

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December, 1982